order that any fines, if paid, be refunded. The order of disqualification is also set aside.

I would add a few remarks in connection with this case. The learned Magistrate appears to have overlooked the provisions of section 92(4) of the Road Traffic Ordinance. In my view, a conviction under section 92(1) leaves no option for him but to confiscate the vehicle, and I would draw the attention of all Magistrates to this point. Another observation I would make is that it is time members of the public realise that it is in their own interest to use regular public service vehicles instead of unlicensed hire cars or taxis, because in the event of death or injury suffered by them while such vehicles are used in breach of the conditions of their insurance policy they can have no hope of recovering compensation from the driver or owner who, in practically all cases, are men of straw.

Appeal allowed

Solicitors: *Kaher Singh & Karam.*

ONG KENG HUAT v. HONGKONG UNITED CO. LTD. & ANOR.

[C. A. (Thomson C.J., Rigby and Neal JJ.) September 13, 1960]

[Ipoh — F.M. Civil Appeal No. 29 of 1960]

Partnership — Breach of duty — Whether partner individually liable for loss arising out of partnership — Whether culpable negligence — Evidence of business practice.

The parties were partners for the purpose of operating a cinema. The appellant was the General Manager with executive powers and control, the second respondent was Treasurer and the first respondent was in charge of arranging shows at the cinema. In 1957 the cinema was badly damaged as a result of fire. Disputes arose between the partners resulting in a dissolution of partnership. The respondents alleged that the appellant, as a partner entrusted by the terms of the partnership agreement with the management of the cinema was at all times liable for such matters as the insurance of equipment installed in the cinema and also insurance against workmen's compensation payable to employees of the partnership. It was alleged that he failed to insure the fans installed in the cinema and to effect sufficient insurance against workmen's compensation in consequence whereof the partnership had suffered loss. In his defence the appellant denied that he acted in breach of his duty to his partners as alleged. He alleged that the matter of insurance was fully discussed at a meeting of the partners, and the details were left to a Mr. Tan Chong.

Held: (1) it could not be disputed that there was a breach of duty on the part of the appellant to effect the necessary insurance;

(2) in order to make one partner liable for any loss arising out of the partnership it is necessary to establish either that he was guilty of fraud or culpable negligence or wilful default: whether a mere breach of the duty of the appellant in this case to effect the necessary insurance amounted to culpable negligence was a question of fact depending upon the degree of negligence involved;

(3) in the absence of some evidence as to what is the practice in regard to effecting insurance in this type of business it is impossible to say that the mere breach of duty on the part of the appellant amounted to culpable negligence, and hence the appellant is not personally liable.

Case referred to:—

(1) *In re National Bank of Wales, Ltd.* [1899] 2 Ch. 629 at 672.

CIVIL APPEAL.

R. Talalla for the appellant.

B. K. Das and *N. Thurairajah* for the respondents.

Rigby J. (delivering oral Judgment): This is an appeal from a decision of Mr. Justice Azmi. The appeal is restricted to part of an order made by him arising out of a partnership action.

The brief facts of the case were that in August, 1956, the appellant and the two respondents entered into a partnership agreement for the purpose of taking over and running the Star Cinema, Ipoh, for a period of five years.

In pursuance of that agreement the lease of the cinema was obtained from the owners for a period of five years as from 1st September, 1956. Under the terms of the partnership the partners' shares were in equal shares and under the partnership agreement itself the First Party, that is to say the appellant, was to be the General Manager of the Cinema with executive powers and control. The second respondent was to be the Treasurer and the first respondent was to be in charge of arranging for the showing of the particular films to be exhibited at the Cinema.

In January, 1957, the Cinema was badly damaged as a result of fire and was not in fact repaired until 6th February, 1958. In the meantime it would appear that the partnership, both before and, indeed, after the fire, got into financial difficulties, and disputes arose between the partners resulting in a dissolution of partnership in November, 1957, and an application to the Court for a declaration as to the date of dissolution and for the usual order for accounts to be taken.

By paragraph 26 of the plaintiffs' (that is to say the present respondents) statement of claim it was alleged that the defendant (that is to say the present appellant). as the partner entrusted by the terms of the partnership agreement with the management of the said Star Cinema, was at all times liable for such matters as the insurance of equipment installed in the said Star Cinema and also insurance against workmen's compensation payable to employees of the partnership. It was alleged that in breach of his duty in this behalf which, under the terms of the partnership agreement, he owed to the plaintiffs as his partners, the defendant failed to insure the fans installed on the said theatre premises and hired from the Central Electricity Board, and also to effect sufficient insurance against workmen's compensation in consequence whereof the partnership has suffered loss as a result of the said fire. Particulars of the loss were the cost of fans hired from the Central Electricity Board and destroyed, and compensation payable to an employee who suffered fatal injuries as a result of the fire.

By paragraph 12 of his defence the defendant denied that he acted in breach of his duty to his partners, the first and second plaintiffs, as alleged. The paragraph continues that the matter of insurance was fully discussed at a meeting of the

partners held in 1956 at which Mr. Tan Chong the hall manager, and a representative of the Asia Insurance Company were present, and the details were left to the said Mr. Tan Chong.

Mr. Das for the respondents contended, and in my view rightly contended, that the paragraph, in effect, was a plea of confession and avoidance. The defendant did not deny that there was a duty to insure but he alleged that the matter had been discussed at a meeting and it had been left to the Cinema Manager to make the necessary arrangements.

At the trial, evidence was given on behalf of the respondents that no such agreement had in fact been made with Mr. Tan Chong to arrange the matters of insurance. The defendant himself did not give evidence. The learned Judge in dealing with this matter said this:—

"There is another claim in the Plaint which has to be decided now and that is whether the defendant should be liable for the failure to insure the fans installed in the said premises and hired from the Central Electricity Board and also the failure to effect sufficient insurance against Workmen's Compensation in consequence whereof the partnership has suffered loss. The defendant denies this liability and alleges in paragraph 12 of the defence that the matter of insurance was fully discussed at the meeting of the partners held in 1956 at which Mr. Tan Chong, the Hall Manager, and the representative of the Asia Insurance Company were present when the details were left to the said Mr. Tan Chong. The defendant, unfortunately, did not give any evidence in the suit and I find, therefore, nothing in support of his contention. For that reason, I would hold that the defendant be liable for the loss as a result of his failure to insure."

It would seem quite clear from that judgment that the learned trial Judge took the view that since the appellant had failed to give evidence that there was an agreement that the matter of insurance should be left to someone else to deal with, then he had failed in his defence and was consequently liable. Unfortunately it was never argued before the trial Judge whether, assuming there was a breach of duty on the part of the appellant to effect the necessary insurance, that breach constituted culpable negligence, and there was no evidence called before the trial Judge on this matter. It is, of course, quite clear, as I understood the law, that in order to make one of the partners individually liable for any loss arising out of the partnership it would be necessary to establish either that he was guilty of fraud or culpable negligence or wilful default. It seems to me that whether the mere breach of the duty of the appellant in this case to effect the necessary insurance amounted to culpable negligence was a question of fact depending upon the degree of negligence involved.

Mr. Das, in the course of his argument as to what can be held to constitute culpable negligence, referred to the case of *In re National Bank of Wales, Ltd.* [1] and to a passage in the judgment of Lord Lindley, Master of the Rolls, in that case. In the course of dealing with the question as to what constituted culpable negligence the learned Lord Justice said:—

"Their negligence (i.e. the negligence of the directors of the Bank) must be, not the omission to take all possible care; it must be much more blameable than that: it must be in a business sense culpable or gross. We do not know how better to describe it."

As I have said, in my view, on the pleading in this case it cannot be disputed that there was a breach of duty on the part of the appellant to effect the insurance of the fans and to carry out the insurance in respect of Workmen's Compensation Ordinance. But whether that breach of duty amounted to culpable negligence was a question of fact which it was impossible, in my view, to decide without some evidence before the learned Judge as to what was the practice in regard to effecting insurance in this type of business. In my view, in the absence of any such evidence whatsoever it seems to me impossible to say that the mere breach of duty on the part of the appellant to effect the necessary insurance amounted to culpable negligence.

For these reasons I would allow this appeal with costs and vary the order made by the learned trial Judge by deleting that part of his order which provides that the appellant shall be held personally liable for the loss arising by reason of the failure to insure the fans hired from the Central Electricity Board and by reason of the omission to effect adequate insurance in respect of workmen's compensation.

Thomson C.J. (delivering oral judgment): I agree with what My Lord has just said and would make the same order as proposed by him in this appeal.

Briefly it comes to this. Breach of duty and actionable negligence are not the same thing. On the pleadings there was an admission of the first of these things. As regards the second, actionable negligence, there was neither admission on the pleadings nor evidence and so to my mind the conclusions which My Lord has stated are inescapable.

In fairness to the learned trial Judge there is one thing I would add. The point at issue in this appeal was a single very small point which arose in the course of a very technical and complicated case and reading the record one is driven to the conclusion that that case was not placed before the trial Court with as much clarity and comprehension as the Court was entitled to expect.

The order of this Court will be that the appeal is allowed with costs; that the order of 19th March, 1960, is accordingly amended by the deletion of the first paragraph on the second page and the words "as regards the defendant's liability" in the following paragraph. The deposit in Court will be paid out to the appellant.

Neal J. concurred.

Appeal allowed.

Solicitors: *Lovelace & Hastings; Maxwell, Kenion, Cowdy & Jones.*